In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-924

FAGAN DICKSON, PETITIONER

v.

GERALD R. FORD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Petitioner brought this suit in the United States District Court for the Western District of Texas, seeking a declaration that the Emergency Security Assistance Act of 1973, 87 Stat. 836, is unconstitutional. His complaint alleged that the military aid to Israel authorized by the Act violates the First Amendment because "[t]he State of Israel * * * [and] the Jewish people constitute 'an establishment of religion.' "[1] Petitioner sought an injunction against the President and the Comptroller General to prevent them from carrying out provisions of the Act.

A three-judge district court was convened. The district court dismissed the complaint, holding that petitioner lacks standing and that the case presents a nonjusticiable political question. 379 F. Supp. 1345. This Court, citing *Gonzalez* v. *Automatic Employees Credit Union*, 419 U.S. 90, vacated the order of the three-judge

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[1]Complaint, p. 3.

court and remanded the case to the district court "so that a fresh order may be entered from which a timely appeal may be taken to the United States Court of Appeals." 419 U.S. 1085.

On remand the three-judge court dissolved itself (Pet. App. A-1). After granting petitioner's motion for leave to amend his complaint to include a challenge to Sections 18 and 45(a)(7) of the Foreign Assistance Act of 1974, Pub. L. 93-559, 88 Stat. 1800 and 1815, the single-judge district court entered an order of dismissal, adopting the reasoning of the initial opinion of the three-judge court (Pet. App. A-3 to A-4). The Court of appeals affirmed (Pet. App. A-5 to A-7; 521 F.2d 234), holding that petitioner's complaint "clearly present[ed] a nonjusticiable political question beyond the jurisdictional limitations imposed upon federal courts by Art. III of the Constitution" (Pet. App. A-6). The court of appeals declined to reach the question whether petitioner had satisfied the standing requirements of *Flast* v. *Cohen*, 392 U.S. 83.

Petitioner's claims present nonjusticiable questions. The court of appeals correctly recognized that petitioner's complaint is nothing but a challenge to the power of the President and of the Congress to conduct the foreign affairs of the United States. The Emergency Security Assistance Act of 1973 was designed to create a balance of military forces in the Middle East and thus help to end the prevailing hostilities.[2] This case therefore is governed by the well-settled rule that the judiciary should defer to

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[2]As the court of appeals observed, "[b]oth the Congress and the President have determined that military and economic assistance to the State of Israel is necessary at this time to 'maintain a balance of forces in the Middle East and [to] maintain Israel's self-defense capacity, in accordance with long-standing national policy of the United States.' S. Rep. No. 93-657, 93d Cong. 1st Session 3 (1973); 9 Weekly Compilation of Presidential Documents 1291 (Oct. 29, 1973)" (Pet. App. A-7).

the judgment of the political branches of government in the conduct of foreign affairs. As this Court stated in *Oetjen* v. *Central Leather Co.*, 246 U.S. 297, 302:

> The conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative—"the political"—Departments of the Government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision.

See also *Baker* v. *Carr*, 369 U.S. 186, 211; *Chicago & Southern Air Lines, Inc.* v. *Waterman S.S. Corp.*, 333 U.S. 103, 111. There is no conflict among the circuits and no reason to grant the petition.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

FEBRUARY 1976.